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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE SANTOS TORRES,

Defendant and Appellant.

H033337

(Santa Clara County
Super. Ct. No. CC315303)

Defendant Jorge Santos Torres was convicted after jury trial of second degree murder (Pen. Code, § 187).¹ The jury further found true a special allegation that defendant personally used a deadly and dangerous weapon, a knife, in the commission of the offense (§ 12022, subd. (b)(1)). The trial court sentenced defendant to the indeterminate term of 15 years to life consecutive to the determinate term of one year.

On appeal, defendant contends that the admission of irrelevant and highly prejudicial gang evidence resulted in an unfair trial and violated his right to due process. He further contends that defense counsel rendered ineffective assistance by failing to object to the introduction of the gang evidence. As we reject both of defendant's claims, we will affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise specified.

Defendant has also filed a petition for writ of habeas corpus, which contends that defense counsel rendered ineffective assistance by failing to object on the record to the gang evidence. We have disposed of the petition by separate order filed this date. (Cal. Rules of Court, rule 8.387(b)(2)(B).)

BACKGROUND

Defendant was charged by information with murder (§ 187). The information also included a special allegation that defendant personally used a deadly and dangerous weapon, a knife, in the commission of the offense (§ 12022, subd. (b)(1)).

The Prosecution's Case

James Cruz drove Vincente Yuen, Yuen's cousin Joseph Craig, and some friends, including Joshua Parras, from Hayward to the Cinco de Mayo festivities in San Jose on Sunday, May 4, 2003. Late that night, they drove into a USA gas station on Story Road and parked. Everybody got out of the car to see what was going on around them. The traffic was bumper to bumper and a lot of people were in the gas station, on the sidewalk, and in the street. Yuen and Parras stood on the sidewalk near the entrance to the gas station for a while talking to girls. Yuen then walked into the street towards a car full of girls. A white Honda Accord hit Yuen and almost hit Parras. Yuen became upset, yelled out “ ‘hey,’ ” “ ‘watch it,’ ” and then slammed his hands down on the trunk of the Honda. Two men, the driver and the passenger, got out of the Honda. Somebody yelled, “what’s up,” and Yuen responded. The Honda passenger rushed Yuen, and swung at him, and Yuen swung back while backing up. Other people got involved. Two men hit Parras in the face as he tried to defend himself.

The fighting moved from the street into the gas station. The Honda passenger grabbed Yuen's shirt. He made “a right roundhouse swing” towards Yuen's midsection, at least twice. The passenger had “a shiny object” in his clenched fist. He and the driver then retreated to the Honda and drove away, and everyone scattered. Yuen collapsed in the back of the gas station. His shirt was ripped and blood was coming from his chest

area. John Rodriguez, a witness to the fighting, called 911 and officers arrived within minutes, but Yuen died at the scene from two stab wounds to the chest.

Parras received a small stab wound to the stomach. Officers found a knife blade at the scene. A criminalist analyzed a swab of blood taken from that knife blade and determined that the blood was Parras's.

Walter Jusino, who had just met Yuen that night, went into the street after the fighting stopped in order to get the license plate of the white Honda as it drove away. All he was able to remember was that the last three numbers of the plate were "808." He gave that information to the police at the scene. Jusino identified defendant at trial as the passenger from the Honda who stabbed Yuen.

Defendant was with Andrew Flores, a childhood friend, at Flores's home on the evening of Sunday, May 4, 2003. Late in the evening, Flores asked his sister if he and defendant could use her car, a white Honda Accord, so they could go to the Cinco de Mayo festivities. She agreed. Flores and defendant first went to a Jack in the Box on Tully Road to get something to eat. After that, they went cruising on Story Road. Near the USA gas station at the intersection of Story and McGinnis, Flores was "riding on the brake" of the Honda when the car "bumped" a man who was in the street.

A group of people, including the man Flores bumped, started pounding on the top of the passenger side of the Honda. Flores, who was not armed, stopped the Honda, opened the car door, and got out. Defendant also got out of the car. Flores looked over the roof of the car and asked what was going on. He walked towards the back of the car. Three or four men came towards him and confronted him. A fight ensued. After about 30 seconds, Flores heard somebody yell that someone had been stabbed. Everybody scattered. Flores and defendant got back in the Honda and drove away. Flores dropped defendant off at his house. When defendant got out of the car, Flores saw defendant throw something into his fenced yard.

Flores went home. He turned on his police scanner and learned that somebody had died. He also heard a license plate number being reported, including a part of his sister's license plate, the numbers "808."

Flores contacted defendant the next day, and asked defendant what he had done. Defendant said that he was fighting with a man, he became angry, he pulled out a knife, and he stabbed the man in the chest. Defendant said that he used bleach and water on the knife to get rid of the blood, and then threw the knife up on the roof of his house. Defendant also said that he was going to go to Mexico.

Flores removed the Honda's license plates and put other plates on it. He then went to stay with his uncle in Modesto. While there, he learned that he was wanted for murder. After contacting an attorney, he turned himself in on June 5, 2003. He remained in jail until, pursuant to a plea agreement, he pleaded guilty in October 2004, to being an accessory to murder.

John Paul Ortiz was driving his father's Hyundai when he met up with Flores and defendant, his childhood friends, on Story Road the night of May 4, 2003. Near the USA gas station, Ortiz heard a noise and saw a group of men surround Flores's car. Ortiz got out of his car when he saw Flores and defendant get out of their car. Several fights broke out and Ortiz saw Flores and defendant fighting with people Ortiz did not know. Ortiz did not join the fighting, and he lost sight of Flores and defendant for a while. When the fighting stopped, Ortiz saw Flores and defendant in the crowd. They all got back into their cars and drove away.

While Ortiz was on his way home, he received a call from defendant. Defendant told Ortiz to "lock your shit up, or something like that." Ortiz took it to mean, "park the car," "[j]ust go home." A day or two later, Flores contacted Ortiz and told Ortiz what defendant had told him. Flores asked Ortiz to call the police and report seeing a different license plate number. Ortiz agreed to do so. On May 7, 2003, Ortiz contacted the San Jose Police Department and reported that he was a witness to the fighting near the USA

gas station. He said that, after the fighting, he saw two people he did not recognize speed away in a white Honda. He said that he remembered the license plate of the Honda ended in “888,” not “808” as had been reported in the newspaper.

On May 14, 2003, the police received an anonymous tip directing them to Flores’s home. There they found the white Honda in the garage. Ortiz spoke to the police again on May 21, 2003, and told them what he knew. Ortiz was arrested on June 5, 2003, and charged with being an accessory to murder. He entered into a plea agreement whereby he pleaded guilty to a misdemeanor in exchange for testifying truthfully at defendant’s trial.

On September 15, 2005, defendant was a passenger in a car stopped in Morgan Hill for a routine traffic violation. Defendant, who was seated in the back of the car, originally identified himself as Giovanni Santos to the officer who stopped the car. The officer unsuccessfully ran that name and the date of birth defendant gave him. Defendant fled when the officer attempted to take him to the patrol car. Defendant was located the next day, hiding in the crawl space under his family’s Morgan Hill residence.

The Defense Case

Defendant testified in his own defense as follows.

Defendant and Flores were at Flores’s home on Sunday, May 4, 2003, when Flores’s sister came home from work around 11:00 p.m. Flores asked his sister if they could use her car. She reluctantly agreed. Defendant and Flores drove to the Jack in the Box on Tully Road and stayed there for a while watching and talking to acquaintances. Flores then drove to Story Road, where the traffic was bumper to bumper and people were milling about.

As they approached McGinnis, near a gas station, defendant was talking to his girlfriend on his cell phone when he heard a bang on the hood of the car. He looked up and saw a crowd of people at the side of the car and heard more banging on the top and trunk of the car. He lowered his window a little and asked what was going on. He then heard a thud on the top of the car as if something had been thrown at it. He got out of the

car and asked, "What's your problem?" Someone in the crowd said, "fuck you," and defendant responded, "Fuck you too."

Someone in the crowd took a swing at defendant and hit him on the left side of his head. He put up his left arm to block any additional blows and took a swing with his right arm. He did not hit anybody, but he was hit on the right side of his forehead. Then he was hit on the jaw and he fell to his right knee.

Defendant happened to have a friend's pocketknife on him. He had been cruising around with that friend earlier that day when he told the friend that he should not have the knife on him. The friend threw the knife on the seat of his car and defendant later picked it up and clipped it to his right pants pocket. After defendant fell to his knee, he pulled out the knife and opened it. With his left arm extended, he swung the knife "wildly" with his right hand "at no one, really." He grabbed something, which could have been somebody's shirt, and swung the knife again as he tried to get up. He did not think he hit anybody with the knife either time. However, his actions had the desired effect, because somebody said "he has a knife," and the people around him backed up.

Defendant stood up, looked around, and realized that he was in the gas station. He did not see that anybody was injured, and he put the knife in his pocket. Other scuffles were still going on. As he headed back to his car, somebody came up to him and they exchanged blows. He heard somebody yell that someone had been stabbed. He and Flores got back in their car and drove away. On the way home, defendant took the pocketknife out of his pocket and looked at it, but did not see any blood on it.

Defendant called Ortiz, who asked him what had happened. Defendant responded that he did not know. He told Ortiz to just go home. Flores took defendant home. Defendant checked himself and found only minor bruises and no blood. His girlfriend picked him up and took him to her apartment. He threw the knife in the garbage at her apartment the next morning. That afternoon, Flores came to the apartment and told defendant that somebody had died the night before. Flores asked defendant what he had

done, and defendant responded that he did not know. He started crying because he thought that he could have been the one who killed the victim. He was afraid and did not know what to do, so he fled to Mexico that night. Within a month he learned from his family that he was wanted for murder. He returned to San Jose in early April 2005, and planned to turn himself in. He had spoken to a lawyer just two days before he was arrested on September 16, 2005. He is still not sure if he is the person who stabbed Yuen.

Verdicts and Sentencing

On June 19, 2008, the jury found defendant not guilty of first degree murder but guilty of second degree murder (§ 187), and found true a special allegation that defendant personally used a deadly and dangerous weapon, a knife, in the commission of the offense (§ 12022, subd. (b)(1)). On September 5, 2008, the court sentenced defendant to the indeterminate term of 15 years to life consecutive to the determinate term of one year.

DISCUSSION

Defendant contends that the admission of extensive evidence about gangs, when there was no evidence that the murder was gang-related, resulted in an unfair trial. He argues that the gang evidence was irrelevant to the issue of who murdered Yuen, that its only relevance was to impeach certain witnesses' credibility, and that, as such, it should have been excluded as merely cumulative of other evidence. He also argues that the evidence was highly prejudicial. Lastly, defendant contends that his counsel rendered ineffective assistance by failing to move in limine to exclude the gang evidence, and/or by failing to make specific objections on the record when the evidence was presented at trial.

Background

Neither the prosecutor nor defense counsel raised the issue of gang evidence in their motions in limine. The gang evidence presented at trial was as follows.

Andrew Flores

During his direct testimony, Flores repeatedly stated that he did not remember a lot of things that happened on the night of the stabbing incident, and that he did not remember conversations he had with defendant, Ortiz, his mother, and his sister between the time of the stabbing incident and when Flores turned himself in in June 2003. After Flores identified a photograph of himself taken when he turned himself in, the prosecutor asked him if he was a Norteño gang member on May 5, 2003. Defense counsel did not object, and Flores first responded that he would not consider himself a gang member. He stated that he was familiar with “BES,” or “Barrios of East Side,” because they were “around the neighborhood.” He then admitted that he was “a part of the gang” on May 5, 2003. The prosecutor asked to have another photograph marked for identification, and defense counsel objected. At a side bar conference, defense counsel told the court that his objection was “[w]hat we had discussed. The gang allegations weren’t part of this case. His gang affiliation is irrelevant. Those pictures are unduly inflammatory.”

The court asked the prosecutor what the relevance of the evidence was. The prosecutor responded, “Well, in the gang culture, no witness is going to come in and testify against another. And clearly this witness has a lapse of memory that’s beyond unbelievable. That’s known as snitching and you can’t snitch. And it’s my position that based upon his past membership, he is conveniently forgetting everything that is relevant to this case.” The court responded, “All right. You have already established that he is. If you want to ask him whether or not it is part of the gang culture not to testify and so forth, you can do that. I will allow it. It is highly relevant to this witness’s credibility. [¶] However, the pictures are unnecessary for that purpose because he’s already acknowledged being a member of the gang. [¶] I’m going to sustain the objection with regard to the photographs. I’ll allow you to inquire as to whether or not there is an element of the gang culture.”

The prosecutor asked Flores whether it would be fair to say that, as a gang member, being a snitch is one of the worst things you can do. Flores responded, “that’s in general. Wouldn’t say that’s a gang lifestyle,” but it “[c]ould be” “a bad thing” if a gang member testifies against “someone else.” The prosecutor asked Flores if his lack of memory was “due to the fact that [he] as a gang member [did] not want to come in and testify against the defendant in this case.” Flores responded, “No. I can’t even remember my girlfriend’s birthday every year. I have been with her for four years. She gets mad at me. It’s just my memory.”

Flores’s cross-examination, redirect examination, and recross-examination occurred after Ortiz testified, because Flores failed to return to court the day after his direct testimony. During his redirect examination, the prosecutor asked Flores if he remembers seeing any Norteños or Sureños during the fighting. Flores responded that he assumed that the majority of the people there were Norteños, and that Sureños “are not really out there like that” on Cinco de Mayo. Flores testified that there was a large Sureño area around the USA gas station and that he did not consider the area his “turf.” When the prosecutor asked Flores if he was “happy with the Sureños living down Story Road,” defense counsel objected “as irrelevant to this inquiry and beyond the scope of cross-examination.” The court overruled the objection, and Flores responded “No.”

The prosecutor then asked Flores a series of questions about gang fights. Flores testified that “gang fights happen.” He testified that backing down from a fight shows “weakness,” that it can make the gang “weaker,” and that “step[ping] up” could make the gang “stronger.” He testified that BES gang members wear hats and clothes with the Boston Red Sox “B,” but that not all people who do are BES gang members. He testified that defendant had “never aligned himself as a Norteño” although he “hangs out” with Flores, who is a Norteño, and that it would be “fair to say” that there was no reason for a Norteño to want to attack defendant. He testified that a Norteño does not always have an

obligation to “back” another Norteño who has been attacked. “You just don’t help someone out because of who he is, you don’t know him.”

On recross-examination, defense counsel asked Flores, “Was this fight a gang-related fight as far as you were aware?” Flores responded, “No.” Flores testified that he did not see anybody he knew was a gang member, and that he did not see anything that led him to believe that gang activity was occurring. When asked if he could tell whether Yuen was a Norteño, Flores responded, “I didn’t even see his face. I don’t even know what he looks like.” Flores testified that even if the people in the area were Norteños, he did not want them pounding on his car. He does not remember what he was wearing that night. Although red is associated with Norteños and blue is associated Sureños, just because a person is wearing something red or blue does not mean that they are a Norteño or Sureño gang member. He was not able to tell whether the three men who accosted him were Sureños or Norteños “or nothing at all.” There was nothing that led him to believe that the fight was “a gang kind of situation.”

John Paul Ortiz

During his direct examination, Ortiz stated that he could not remember how it came about that he told the police during his interview on May 21, 2003, that he knew who the passenger in the white Honda was. The prosecutor asked Ortiz if he was afraid of either defendant or Flores, and Ortiz responded negatively. The following then occurred.

“[THE PROSECUTOR:] Andrew Flores was a BES gang member, correct?”

“[ORTIZ:] I guess so. I don’t know.

“[THE PROSECUTOR:] “You don’t know? You don’t recall telling the police that Andrew Flores was a BES gang member?

“[ORTIZ:] I don’t remember what I told the police, but I mean, whether he is or not, I wasn’t afraid of him.

“[THE PROSECUTOR:] Well, do you know that he was?

“[ORTIZ:] Yeah.

“[THE PROSECUTOR:] Okay. And what about George Torres, do you know if he was?

“[ORTIZ:] No.

“[THE PROSECUTOR:] You don’t know.

“[ORTIZ:] No, I don’t know.

In response to further questioning, Ortiz testified that he thought some of the men involved in the fight were Norteños. “I saw a lot of red, a lot of Chicanos and some red.” He testified that “BES” is a Norteño street gang, and that red is associated with Norteño street gangs. He testified that he did not feel he needed to back up Flores and defendant during the fight just because “Norteños back other Norteños.” “If I ever felt a need to back them up, it was because they were my neighborhood friends, friends I grew up with. That was it.” He testified that he did not want “to be snitching” on good friends, but that he “never feared” Flores or defendant; rather, he was “afraid of” retribution by “maybe an outside party.” Lastly, he testified that he does not know whether the intersection of Story and McGinnis was in BES “turf,” but that it is “in the neighborhood” where he lived.

Defense counsel did not object to any of the prosecutor’s questions or to Ortiz’s responses.

On cross-examination, defense counsel asked Ortiz if he was a member of a gang, and Ortiz responded “No.” Counsel asked Ortiz if Flores “started hanging around people who were in gangs” as they were growing up, and Ortiz responded, “I guess you could say that,” but Flores also “[hung] out with other people besides gang people.” Ortiz testified that he knew of people in his neighborhood who were involved in gangs, but that it was not something either he or defendant got involved with.

DVDs of Ortiz’s police interviews on May 21, 2003, and June 5, 2003, were played for the jury. During the May 21, 2003 interview, a detective told Ortiz that he had

documentation showing that defendant and Flores were “cliqued up a little bit in the Norteño thing, but they’re not heavy, heavy. . . . [T]hey’re BSE, or BES, Barrio East Side.” During the June 5, 2003 interview, a detective asked Ortiz if he was in a gang. Ortiz responded negatively, but he admitted “hanging around” with BES gang members. He said that Flores was a member of BES, but he did not know whether or not defendant was. He also said that he knew that BES members wear clothing with the Boston Red Sox “B.”

John Rodriguez

Rodriguez, the witness who called 911, was not questioned about gang activity at trial. However, a DVD of his police interview the afternoon following the stabbing incident was played for the jury after Flores and Ortiz testified. In that interview, Rodriguez stated that “everybody that was in the street” was wearing red, but neither person from the white Honda was wearing red. Although the stabbing victim “was wearing white,” “his buddies were wearing red.”

Joseph Craig

Craig, Yuen’s cousin, repeatedly testified that he could not remember the stabbing incident, so a DVD of his police interview on May 5, 2003, was played for the jury some days after the DVD of Rodriguez’s interview was played. During Craig’s interview, Craig said that the passenger in the car that hit Yuen was wearing a navy blue Boston baseball pullover with a “B” on it, and that the driver was wearing a solid white T-shirt.

Officer Melinda Zen

Morgan Hill Police Officer Melinda Zen assisted in the location and arrest of defendant after the September 15, 2005 car stop. She testified that she was asked to attempt to make contact with the occupants of the home where defendant was believed to be hiding, which was also defendant’s family’s residence. The prosecutor asked the officer if she had been advised as to what defendant was wanted for. The officer responded, “Yes. [¶] . . . [¶] The suspect had an active warrant for a gang-related

homicide.” Defense counsel did not object to this testimony. Nor did defense counsel request an instruction limiting the jury’s consideration of any of the above gang evidence. (See, e.g., CALCRIM No. 1403.)

The Parties’ Arguments to the Jury

During his opening argument to the jury, while discussing the credibility of the various witnesses, the prosecutor argued that Ortiz was willing to lie on Flores’s and defendant’s behalf, and that Ortiz did not want to “give up” defendant. “And why, why doesn’t he want to give up the defendant? You listen to his tape and he says he’s afraid of him. He’s afraid of the defendant. And he’s afraid of what might happen to him if he gives up that information. If that paperwork hits the streets, he’s afraid what might happen if he identifies the defendant as being the one that stabbed the victim. [¶] Why? Well, you heard the evidence of gang membership. You heard the evidence of what a snitch is and what happens to snitches. But he’s afraid of the defendant. And he refuses to the point where he’s putting himself in jeopardy to give up that name.”

The prosecutor further argued that Flores’s statement to the police and his testimony were not credible. “After the fight, the back of the car, he ran back to the driver’s door. When the defendant returned, came from the direction of the gas station, Flores took the defendant home. While at home, he was listening to a police scanner and heard the victim had no pulse and a description of the stabber and the vehicle associated with the partial license number. [¶] I found this to be very interesting. How many gang members go home and listen to scanners? How many people have scanners and why would you have a police scanner? [¶] Well, obviously at this point Mr. Flores knew what had happened. It wasn’t anything new to him. But he was curious and what he was concerned with is whether or not they are going to be able to link him to that particular homicide.”

During defense counsel’s closing argument, he argued that defendant’s actions were not unreasonable. “Finally, in your analysis of this, what’s the final little factor that

you put into this when you determine what's going on here? It's [defendant]. You put that person, that real person, into that analysis. Who he is. You heard from him. You saw him on the stand. You have seen a video of him. And again I urge you please watch those again. [¶] It confirms who he is, what he told you he is. He's not some gang banging idiot that the prosecution wants you to believe. John Paul Ortiz did not say he was afraid of [defendant]. He never said – in fact, he said he wasn't afraid of [defendant]. He's afraid of this no snitch mentality that unfortunately permeates a lot of society. He's afraid of this ubiquitous others out there, is what he told. [Defendant] is his friend. He's not afraid of [defendant]. You saw [defendant] in those videos. He's not someone to be afraid of.”

During the prosecutor's rebuttal, the prosecutor argued that the incident did not happen the way defense counsel argued. “Well, we know that it all began with Andrew Flores hitting an 18-year-old high school student. That's how it all began. A BES gang member who decided that on east side turf nobody stands in front of me. What does he do? He hits Vicente Yuen, an 18-year-old drunk or under the influence high school student. [¶] So what does a BES gang member associate do? He gets out of the car and he goes after Vicente Yuen. Why? This is our turf. Nobody gets down on our turf. What happens? The man, the defendant goes after him, blows are struck. And I want you once again – it's not fair and it's not justice for the defendant to be able to flee for two and a half years and then come into court here and say, you know what, all those witnesses you can't believe them because so much time has passed.”

Analysis

“To prevail on a claim of ineffective assistance of counsel, a defendant ‘ ‘must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.’ ’ [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible,

and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent that the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

"Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence." (*People v. Hayes* (1990) 52 Cal.3d 577, 621.) " 'Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight. . . . A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1185.) "Because after a conviction it is all too easy to criticize defense counsel and claim ineffective assistance, a court must eliminate the distorting effects of hindsight by indulging 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citations.]' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 158; see also *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1447-1448 (*Sanchez*).)

We acknowledge that evidence of gang affiliation may be inflammatory. "[E]vidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts" (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; see also *People v. Williams* (1997) 16 Cal.4th 153, 193

(*Williams*).) Evidence of gang membership has been admitted to prove bias, but there is a “well-settled rule that the use at trial of cumulative evidence of bias in the form of gang-affiliation evidence constitutes an abuse of discretion. [Citations.]” (*People v. Davis* (1996) 42 Cal.App.4th 806, 813; see also *Sanchez, supra*, 58 Cal.App.4th at p. 1449.) However, “nothing bars evidence of gang affiliation that is directly relevant to a material issue” (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 588 (*Tuilaepa*)), unless its probative value is substantially outweighed by its prejudicial effect. (Evid. Code, § 352; *Williams, supra*, 16 Cal.4th at p. 193; *People v. Champion* (1995) 9 Cal.4th 879, 922-923 (*Champion*).)

Evidence of gang membership, and the conduct associated with that membership, is relevant if such evidence tends logically, naturally, and by reasonable inference to establish a motive in a gang-related crime or to fortify the testimony of witnesses who have identified the defendant as a participant in the crime. (*Champion, supra*, 9 Cal.4th at p. 922; *Tuilaepa, supra*, 4 Cal.4th at p. 588.) In addition, testimony that a witness is fearful of gang retaliation is admissible evidence relating to the witness’s credibility. (*Sanchez, supra*, 58 Cal.App.4th at pp. 1449-1450.)

“[A]dmission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court’s decision exceeds the bounds of reason.” (*People v. Valdez* (1997) 58 Cal.App.4th 494, 511 (*Valdez*).)

Defendant cites *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*) as support for his claim that the admission of the gang evidence was extremely prejudicial. In *Albarran*, the trial court found prior to trial that the proffered gang evidence was relevant to the gang enhancement as well on the issues of motive and intent as to the underlying charges. (*Id.* at p. 220.) After trial, the jury found the defendant guilty as charged and found the gang enhancement allegations true. However, the gang allegations were later dismissed without prejudice when the trial court found insufficient evidence to support them. (*Id.* at p. 222.) The appellate court found that, even if some of the gang

evidence was relevant to the issue of motive and intent, other extremely inflammatory gang evidence was admitted that had no connection to the offenses at issue. (*Id.* at pp. 227-228.) “Certain gang evidence, namely the facts concerning the threat to police officers, the Mexican Mafia evidence and evidence identifying other gang members and their unrelated crimes, had no legitimate purpose in this trial.” (*Id.* at p. 230.) “From this evidence there was a real danger that the jury would improperly infer that whether or not [the defendant] was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished.” (*Ibid.*) Accordingly, the court found that the case was “one of those rare and unusual occasions where the admission of evidence . . . violated federal due process and rendered the defendant’s trial fundamentally unfair.” (*Id.* at p. 232.)

The Attorney General cites *Sanchez* as support for the contention that the gang evidence was properly admitted in this case. In *Sanchez*, the defendant was convicted of murder and contended on appeal that his trial counsel rendered ineffective assistance by failing to make an Evidence Code section 352 objection to the gang evidence and references admitted at trial. (*Sanchez, supra*, 58 Cal.App.4th at p. 1447.) He argued that the gang evidence was irrelevant to prove any disputed issue; there was no evidence the murder was gang related or gang motivated, and his gang membership was not used to prove his identity for any other issue. (*Id.* at p. 1446.) The appellate court found that trial counsel did not render ineffective assistance as the evidence was properly admissible on the issue of witness credibility. “ ‘ “Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness’s credibility and is also admissible. [Citations.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness’s fear of retaliation is directly linked to the defendant for the evidence to be admissible. [Citation.]” [Citation.]’ [Citation.]” (*Id.* at pp. 1449-1450.)

In this case, defense counsel did not contend in the trial court that the admission of the gang evidence violated his state and federal constitutional right to a fair trial. Nor did defense counsel claim that the gang evidence was cumulative to other less inflammatory evidence, or claim that the gang evidence was improper character evidence, or otherwise make an Evidence Code section 352 objection to the gang evidence. The record reveals he objected to some of the evidence only on relevancy grounds. He did not object when the prosecutor first raised the issue by asking Flores whether he was a gang member on May 5, 2003. Consequently any objection based on the prejudicial effect of the evidence was waived. (Evid. Code, § 353, subd. (a); *Williams, supra*, 16 Cal.4th at p. 206.) Regardless, we conclude that the trial court did not “exceed the bounds of reason” when it allowed the prosecutor to elicit the gang evidence. (*Valdez, supra*, 58 Cal.App.4th at p. 511.)

We find that the trial court could have reasonably concluded that the probative value of the gang evidence was not outweighed by any emotional bias it may have invoked. The challenged gang evidence was relevant and admissible on the issue of witness credibility and to suggest possible gang retaliation as a reason for the witnesses’ asserted lack of memory of the events before and after the stabbing. (*Sanchez, supra*, 58 Cal.App.4th at pp. 1449-1450). Flores, who admitted on direct examination that he was a gang member, testified that he did not remember a lot of things that happened on the night of the stabbing incident or between that time and when he turned himself in. He also testified that it could be “a bad thing” if a gang member testifies against “someone else.” Flores then failed to return to court the next day for cross-examination. In the meantime, Ortiz testified that he knew Flores was a gang member, that he did not know if defendant was a gang member, and that he did not want “to be snitching” on good friends because he was “afraid of” retribution by “maybe an outside party.” And Craig, Yuen’s cousin, repeatedly testified that he could not remember the stabbing incident, so a DVD of his police interview on May 5, 2003, was later played for the jury. During that

interview, Craig said that the passenger in the car that hit Yuen (defendant) was wearing a navy blue Boston baseball pullover with a “B” on it. During Ortiz’s police interviews, Ortiz said that he knew that BES members wear clothing with the Boston Red Sox “B.”

As the gang evidence was relevant and could have survived an Evidence Code section 352 objection, we reject defendant’s claim that his trial counsel provided ineffective assistance by failing to object to the introduction of the evidence on Evidence Code section 352 grounds. Counsel cannot be found incompetent for failing to make futile motions or objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834; see also *Sanchez, supra*, 58 Cal.App.4th at pp. 1449-1450.)

Even if we were to find that not all of the gang evidence should have been admitted and that the admission of some of the gang evidence was erroneous, we cannot say that it made the trial fundamentally unfair. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) And, “[a]bsent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* [(1956)] 46 Cal.2d [818,] 836.)” (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

On the record before us, we cannot say that it is reasonably probable the verdict would have been more favorable to defendant absent the admission of the gang evidence. There was ample evidence of defendant’s involvement in the fighting that resulted in Yuen’s fatal stab wounds. Jusino identified defendant at trial as the person who stabbed Yuen, defendant admitted that he had a knife and slashed out at those involved in the fighting, and defendant admitted that he fled to Mexico because he believed he could have been the person who stabbed the person who died. There was no evidence, as in *Albarran*, of threats to police officers, of the Mexican Mafia, or of other gang members and their unrelated crimes. (*Albarran, supra*, 149 Cal.App.4th at p. 230.) The jury found defendant not guilty of first degree murder, and thus found that defendant’s admitted

actions were not willful, deliberate, or premeditated. As it is not reasonably probable the verdict would have been more favorable to defendant absent the admission of the gang evidence, defendant has not shown that he was prejudiced by admission of the evidence or by counsel's failure to object to the admission of the evidence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MCADAMS, J.

DUFFY, J.